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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 373.

CHARLOTTE CROSS JUST and ANNE ELISE GRUNER,

Petitioners,

v.

ALMA CHAMBERS, as Executrix of the Estate of Henry C. Yeiser, Jr., as owner of the American Yacht *Friendship II,*

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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The petition, and the brief filed in support of it, ask for a review of a subject for which this court has already laid down the guiding principles in many decisions. The Circuit Court of Appeals, of whose decision the petitioners complain, did no more than apply those principles to the facts. The petitioners, while seeming to contend that there has been a misapplication of those principles, are really seeking to have the law changed in order to meet the supposed needs of one case.

This will be demonstrated in that portion of this brief which deals with the matters which the petitioners have chosen to bring to the court's attention. But, first, a preliminary reference should be made to matters which the

petitioners do not mention, or which are set forth in such a way that their true significance is obscured. There are four such matters.

Foremost of these is the statement which appears on page 4 of the petition, where it is said that the action of the Circuit Court of Appeals completely determined the rights and liabilities of the parties.

There is a measure of truth in this statement, but it serves to obscure the fact that the petitioners are asking for a review of a question of damages, which is not in the case now, but which the petitioners hope will be in the case when they shall prove their damages.

The appeal to the Circuit Court of Appeals was from an interlocutory decree of the District Court and was authorized by Section 129 of the Judicial Code, as amended April 3, 1926, 44 Stats. 233. When the Circuit Court of Appeals decided the case it held that the damages, when proved, should be limited to an amount not in excess of the value of the vessel concerned, or $6,135.21. That amount, which had been realized from the sale of the vessel, was, and still is, on deposit with the District Court. R. 26, 38.

Up to the present there has been no finding, or proof from which a finding could be made, that the petitioners' damages equal the value of the vessel, to say nothing of being in excess thereof. Respondent asserts that they are less than that value, and, eventually, the District Court may so find. If so, the decision of the Circuit Court of Appeals will be academic.

The essence of petitioners' position is that the limitation on the amount of the possible damages should be removed before they have proved any damages at all.

There is no question as to the Supreme Court's jurisdiction in the matter, but whether the case is now ripe for the exercise of that jurisdiction, assuming that other circumstances are favorable, is another matter.

The second matter is concerned with the statement which appears on page 3 of the petition, where it is said that the Circuit Court "unanimously approved the findings of fact (R. 864) made by the District Judge (R. 825-835) and affirmed the decree insofar as it held that Yeiser was guilty of negligence and that the injuries were occasioned with his knowledge and privity (R. 865)."

The statement is true, but not sufficiently informative. It obscures the fact that, in addition to the matter which the petitioners now ask this court to review, there were two matters of importance which were argued before and decided by the Circuit Court of Appeals.

The first was whether there was evidence to justify the finding that petitioners had been overcome by carbon monoxide gas and had not been warned of the danger of such gas. With respect to this the Circuit Court held that "every finding of fact which the Judge made is supported by evidence." R. 864.

The second matter related to the duty which a host owes to his social guest when the guest is injured by reason of a defect in the premises of which the host does not have actual knowledge.

Higgins v. *Mason*, 255 N. Y. 104;
Galbraith v. *Busc*, 267 N. Y. 230;
The Blue Moon III, 60 F. (2d) 653;
Restatement of the Law of Torts, Vol. 2 §§331, 332, 341, 342.

With respect to this the Circuit Court, like the court below, held that the criterion of a host's liability to his guest was not what he actually knew but what he should have known. R. 865.

Both courts held that the yacht owner should have known of the defect which was held to have caused the injury and should have warned his guests, the petitioners. They also held that the petitioners had not been warned, although there was not a scintilla of evidence to support the finding. R. 833, 821, 865. The petitioners did not testify at all because they did not appear at the trial. The yacht owner could not testify because he was dead. No one else could say whether the petitioners were warned or not.

In spite of the concurrence of the District and Circuit Courts in deciding both of these matters against it respondent believes that they were wrongly decided. At the same time respondent has no reason to believe that the points involved are such as to make it likely that this court would grant certiorari. Therefore, the respondent has not, and will not, file a cross petition.

On the other hand, respondent is mindful of the remarks of this court in *Langnes* v. *Greene,* 282 U. S. 531, 535-539, wherein it was pointed out that this court has the power, in admiralty cases especially, to go beyond the matters which a petitioner may submit for review and to review other matters as well. It is submitted, therefore, that, should certiorari be granted, respondent would be entitled to urge the court to go beyond the narrow question of how much damages the petitioners may have and to decide whether they should have any at all.

Although the court may do as it sees fit in that regard, it is essential that it should be given full information now as to what the granting of certiorari may involve.

The third preliminary matter is concerned with the petitioners' method of setting forth the facts in such a way as to create the erroneous impression that the State of Florida was the only jurisdiction which had any concern with the events giving rise to this lawsuit. Whether the matters involved in this case are of mere local concern or not (assuming that to be of importance) depends on facts and not on artfulness in presentation.

For instance, petitioners say on page 25 of their brief that all the parties were residing in Florida at the time. It would be more accurate to say that they were in Florida temporarily, that the petitioners resided in St. Louis, Missouri, and that the yacht owner resided in Ohio. R. 109, 80. Indeed, he was an incompetent and his affairs were in the control of a guardian appointed by an Ohio court. R. 73.

Again, on page 2, it is said that the vessel was at all times within the territorial limits of the State of Florida. On page 25 it is said that the vessel was continuously at all times in state waters and that the vessel was docked at Miami, Florida and Fort Meyers, Florida.

If petitioners mean to say only that, while they were on board the vessel, it was at all times within Florida territorial limits, they are correct, for, although the cruise took the vessel about thirty miles south of Miami and at times more than three miles away from the nearest land, still it remained within the territorial limits of Florida as they are defined by the Florida Constitution. Exhibits 4A and 4B, introduced at R. 615, R. 610-613, 58.

On the other hand, if petitioners mean to convey the impression that the vessel was domiciled in Florida because sometimes it docked at Fort Meyers and sometimes

at Miami, they are inaccurate. As the record and exhibits will show, for two months previous to the cruise in which the petitioners participated the vessel had gone on other cruises during the course of which it had touched at various places in and off Florida. Sometimes it docked in Fort Meyers and sometimes it docked or anchored near places which were between Miami and Fort Meyers. Meanwhile it was "down on the Keys and cruising around." During the course of these cruises the vessel used Miami as a base for supplies. R. 464. Exhibit 2, introduced at R. 509.

Neither is there anything to support the suggestion that during these cruises the vessel remained at all times within the territorial limits of the State of Florida. The *Friendship II* was a substantial vessel, carried a crew of six and had two engines capable of propelling her at the rate of eight miles per hour. R. 365, 510, 658, 690, 694, 698, 449, 450. Exhibit 3, introduced at R. 545. She was certainly capable of going outside the territorial limits of Florida and in the course of the cruises which she made it is likely that she did.

The petitioners say that the vessel was not engaged in commerce, interstate or any other kind. If petitioners mean that she was not engaged in carrying goods or passengers for hire, they are correct. But that is not the only kind of commerce in which a vessel may be engaged. A vessel owned by a resident of Ohio which sails on cruises taking it in and out of Florida ports and requiring it to be victtualled, manned and supplied in Florida, is engaged in commerce also, although its ultimate object may be pleasure.

Finally, the statement of facts makes no reference to the fact that the petitioners, if they suffered any injury at all, were caused to suffer it by reason of a defect in an

exhaust pipe, which, according to their claim, caused them to be overcome by exhaust fumes during the time the vessel's engines were being operated in the course of her navigation. The injury, according to the claim, arose directly out of the vessel's operation and navigation. R. 63-65, 521, 830.

The fourth matter of a preliminary nature concerns the statement that the petitioners' injuries were occasioned with the privity and knowledge of Yeiser, the yacht owner. R. 2. That was the finding of the courts below. R. 865, 832. But that should not be taken to mean that the yacht owner had any actual knowledge of the defect in the vessel's exhaust pipe which caused the petitioners' injuries. The privity and knowledge referred to were that which the law implies when a ship owner is personally present on his vessel when a tort occurs. R. 865.

Indeed, the matter of the yacht owner's privity and knowledge under the limitation of liability statute was not the subject of specific contest in either the District Court or the Circuit Court. The respondent contended that there had been no proof of negligence, first, because the duty of care which a host owes a social guest depends on what he actually knows and not on a constructive knowledge implied by law and, second, because, even though the case be judged by constructive knowledge, there was not a scintilla of evidence that petitioners had not been warned of the danger by somebody, if not by the yacht owner himself. When the District Court and the Circuit Court overruled respondent's contentions in this regard, and held that the yacht owner was liable because of a knowledge which he did not but ought to have had, that holding required the further

holding that, under the limitation of liability statute, he should have known of the defect and was therefore privy to the wrong.

POINT I.

BY REASON OF THE MARITIME LAW MARITIME CAUSES OF ACTION IN PERSONAM FOR PERSONAL INJURY ABATE WITH THE DEATH OF EITHER THE TORT FEASOR OR OF THE INJURED PERSON.

The majority of the Circuit Court so held. R. 868. The petitioners challenge this holding and say that it is in conflict with the decision of the Supreme Court in *The Harrisburg*, 119 U. S. 199.

This challenge is set forth at page 6 of the petition as the first reason for granting the petition. It is repeated on page 12 of the brief as one of the specifications of error. It is the basis of Point A of petitioners' argument.

It is of vital importance to the petitioners that the position which they have taken be sound. If it is unsound, there is nothing to the remainder of their argument.

For instance, if the maritime law *ex proprio vigore* provides that causes of action *in personam* for personal injury abate, that is not a procedural regulation but a regulation of substance and right. *Schreiber* v. *Sharpless*, 110 U. S. 76. Furthermore, if the nature of the right so given by maritime law is that it shall end on the death of either the tort feasor or of the injured person, a continuation of the right after death can be accomplished only by changing the nature of the right itself. If one applies to the matter the analogy of *Ormsby* v. *Chase*, 290 U. S. 387, it follows that the power to make such a change resides in Congress only.

In that case it was held that the territorial jurisdiction which gives a cause of action is the only jurisdiction which has the power to abate it. Since petitioners' cause of action was given by the federal maritime law, its abatement was governed by the same law.

Seemingly, the petitioners recognize this, for they insist that, in so far as the maritime law has ever enforced a rule which has resulted in the termination of a cause of action on the death of a tort feasor, it has been by reason of an application in admiralty of the common law of the land. Thus, they argue, there is no maritime rule that such causes of action abate.

It is submitted that it will be sufficient to dispose of this strange and unsound argument to refer the court to its own decision in *Cortes, Administrator* v. *Baltimore Insular Line, Inc.*, 287 U. S. 367 (1932), where, in measured language, a great judge said, at page 371:

> "If the failure to give maintenance or cure has caused or aggravated an illness, the seaman has his right of action for the injury thus done to him, the recovery in such circumstances including not only necessary expenses, but also compensation for the hurt. *The Iroquois,* 194 U. S. 240. On the other hand, the remedy for the injury ends with his death in the absence of a statute continuing it or giving it to another for the use of wife or kin. *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 240; *Lindgren* v. *United States,* 281 U. S. 38, 47. *Death is a composer of strife by the general law of the sea as it was for many centuries by the common law of the land.*" (Italics ours.)

The only possible meaning of the above is that there is a distinct maritime rule that personal injury causes of

action die with the person. The rule exists in the maritime law *ex proprio vigore* and independently of its existence in the common law. Indeed, it exists presently in the maritime law although it no longer exists in the common law. The maritime law does not "follow" the common law, nor the changes which have been made in it by State Legislatures.

The Circuit Court did not refer in its opinion to the above quoted passage from the *Cortes* case. At the time that the opinion was rendered, counsel had not called the court's attention to it. The Circuit Court relied on two district court decisions, which are in accord with the rule set forth by the Supreme Court in the *Cortes* case. One was *In Re Statler,* 31 F. (2d) 767, decided in 1929. The other was *Crapo* v. *Allen,* Fed. Cas. No. 3360, decided in 1849. Petitioners say that these decisions are not in point. In order to show that petitioners are wrong and that the Circuit Court was right, it will be necessary, at the risk of laboring the point, to discuss both decisions at length.

In *In Re Statler,* the causes of action were given by the Merchant Marine Act of 1920, commonly known as the Jones Act. While the suits were pending, and before the matter had been decided, the owner of the vessel died. It was held that the causes of action abated. Judge Knox, who wrote the opinion, held that the abatement took place by reason of the maritime law. He said at page 769:

> "When the deceased petitioner elected to resort to a proceeding for the limitation of his liability, if any, the result of such action was to bring the claims that were asserted against him within the jurisdiction of the court, and to subject them to the application of the law that is here administered. The same law, I think, and particularly since the claims are

based on a federal statute, should determine the question as to whether they now stand abated."

The law to which Judge Knox referred was, necessarily, the maritime law since he was sitting in admiralty.

Judge Knox in the course of his opinion (p. 768) had already said that he had had jurisdiction "to impose personal liability upon petitioner, *provided the same had been found and fixed prior to his decease*". (Italics ours.) He went on to say at page 769:

> "Nor is the result to be different because of the possibility that one or more of the law actions might have gone to judgment against Statler prior to the date of his demise. The frustration of such possibility is but an incident of a procedure which petitioner was at liberty to adopt, and if, on this occasion, the result has been unfortunate, the mere happening of the occurrence is not accompanied by a remedy."

The petitioner mistakenly asserts that the *Statler* case stands for the proposition that the abatement effected therein depended not on the application of the maritime law, but on an application of the common law. Nothing could be farther from the truth. Judge Knox's remarks with respect to the common law were made after he had already disposed of the case by reason of the maritime rule. After having done so, he went on to point out that the causes of action were based on a federal statute. It followed that the paramount intention of Congress, if it could be ascertained, might require a different result (*Michigan Central R. R. Co.* v. *Vreeland*, 227 U. S. 59) and that was what the judge desired. But the judge could not

find such an intention expressed in the statute. He said at page 769:

> "That statute, in terms at least, does not indicate that, aside from the specific exceptions with which it deals, the causes of action which it authorizes shall be measured or characterized by any standard other than that of the common law."

This is the language which the petitioners have misunderstood. Obviously, the court did not mean that the matter of abatement was intended by Congress to be determined according to the common law, or that admiralty customarily applies the common law to determine abatement. The court was merely trying to save the causes of action, already lost, on some reasonable theory. But nothing could be found to indicate a Congressional intent that a non-common law standard should be applied, and, if one should assume that Congress intended the application of a common law standard, the common law itself was not helpful. Therefore, the court concluded as follows at page 769:

> "There being no reasonable theory upon which it can be held that this proceeding should be revived through the entry of the representatives of the petitioner, the motion of claimants directed to that end will be denied."

Unfortunately, it is also necessary to meet petitioners' challenge by discussing the case of *Crapo* v. *Allen* at considerable length. That was an action to recover damages on account of cruel treatment of and an assault on a seaman on the high seas. After the cruel treatment and assault had taken place the seaman was put ashore in a foreign port, and after that he died. No claim was made

that the death was caused by the cruel treatment and assault. The defense was that the causes of action abated by reason of the death of the injured seaman. The court agreed, and said at page 763:

> "The causes of action set forth are maritime and over them the admiralty has undoubted jurisdiction. So far as they are mere torts, the right of action, by the general maritime law, dies with the person injured."

The petitioners, in referring to this case on page 22 of their brief, say that it is not in point because the death (*sic*) for which suit was brought occurred upon the high seas and not in the territorial waters of Massachusetts. They say also that there was nothing to show that Massachusetts was the state of the ship's flag.

The petitioners have misread the case. The action was not brought to recover for death but for personal injuries and, whether they occurred on the high seas or in local waters, they gave rise to maritime causes of action.

The case of *Crapo* v. *Allen*, therefore, is precisely in point with respect to the existence of a maritime rule of abatement.

Indeed, it is not difficult to show that petitioners' reference to the territorial waters of Massachusetts and the law of the ship's flag have not the slightest relation to the point under consideration.

Plainly, the petitioners have borrowed the ideas, and even the phraseology, of Judge Hutcheson, who dissented in the case at bar. R. 871. However, in doing so they must have misunderstood him, for they misapply his thought.

Judge Hutcheson was considerably impressed by the case of *Crapo* v. *Allen*. He referred to its holding with re-

spect to the maritime law of abatement as merely a "general statement", with which he disagreed. R. 871. However, his reference to the territorial waters of Massachusetts and the ship's flag concerned an entirely different matter. The matter to which the dissenting judge referred was that part of the opinion in *Crapo* v. *Allen* which denied the applicability of the local law of Massachusetts in determining whether the action should abate or survive. In dealing with this subject he said that *Crapo* v. *Allen* was correctly decided on its facts because the tort had not occurred in Massachusetts waters and there was no proof that it had occurred on a Massachusetts vessel.

However, the dissenting judge was incorrect in saying that there was no such proof. It would have been more accurate to say that the opinion does not refer to such proof. However, the opinion does show that the libelant asserted that Massachusetts law was the local law, that the court dealt with the case as if it were, and that it held that the maritime law of abatement was paramount.

On page 22 of their brief petitioners seek to give the impression that the judge who decided *Crapo* v. *Allen* indicated in a later case that *Crapo* v. *Allen* had been wrongly decided. Nothing could be further from the truth. However, in order to support their position they quote a passage from *Steamboat Company* v. *Chase*, 83 U. S. 522, in which Mr. Justice Clifford said at page 532:

> "Judge Sprague also applied the same rule in the case of *Crapo* v. *Allen* (1 Sprague, 184), but in a later case (*Cutting* v. *Seabury*, 1 Sprague, 522) he left the question open, with the remark that it cannot be regarded as settled law that an action cannot be maintained in such a case."

In order to understand Mr. Justice Clifford's meaning one must know that *Cutting* v. *Seabury* was an action to recover for the death of a human being. It was not an action to recover for personal injuries. On the other hand, as we have already seen, *Crapo* v. *Allen* was such an action.

The purport of Mr. Justice Clifford's remarks, therefore, is that although Judge Sprague had applied the rule of abatement to causes of action for personal injury he was of the opinion that whether admiralty gave a non-statutory cause of action for death was an open question.

That, indeed, was the actual position of Judge Sprague, and nothing will serve better to show that this is so than a reading of *Cutting* v. *Seabury*. It is plain that Judge Sprague saw no inconsistency, as there was none, between a maritime rule of abatement of causes of action for personal injury, and the existence of a maritime cause of action for death. In this respect Judge Sprague's remarks in *Cutting* v. *Seabury* were symptomatic of a desire shared by many admiralty judges that the maritime law, unlike the common law, should give a cause of action, independently of statute, for death. But such hopes were ended by the decision of the Supreme Court in *The Harrisburg*, 119 U. S. 199.

It is *The Harrisburg* on which the petitioners rely principally. It is necessary only to analyze that case in order to show that petitioners' interpretation of it is incorrect. By so doing their entire argument falls to the ground.

The question which the court had for decision in *The Harrisburg* was not whether, under the maritime law, actions for personal injury *in personam* abate on the death of either party. As stated by the court itself, the question was as follows, page 204:

> "1. Can a suit in admiralty be maintained in the courts of the United States to recover damages for the death of a human being on the high seas, or waters navigable from the sea, caused by negligence, in the absence of an act of Congress, or a statute of a State, giving a right of action therefor?"

The first conclusion at which the court arrived was, in its own words, as follows, page 205:

> "In view, then, of the fact that in England, the source of our system of law, and from a very early period one of the principal maritime nations of the world, no suit in admiralty can be maintained for the redress of such a wrong, we proceed to inquire whether, under the general maritime law as administered in the courts of the United States, a contrary rule has been or ought to be established."

The court then proceeded to analyze the decisions of American courts with respect to the existence in admiralty of a non-statutory cause of action for death. Incidentally, it noted the decisions of Judge Sprague in *Cutting* v. *Seabury* and *Crapo* v. *Allen*. After showing that Judge Sprague had left open in *Cutting* v. *Seabury* the matter of the existence of a non-statutory cause of action for death, it pointed out, at page 206, that "The same eminent judge had, however, held as early as 1849 in *Crapo* v. *Allen*, 1 Sprague, 185, that rights of action in admiralty for mere personal torts did not survive the death of the person injured."

After reviewing the American authorities and showing that they were not in accord, the court dealt with the matter on principle. It pointed out, at page 212, that the laws of Scotland and France gave a cause of action for death.

It had already shown that neither the common law of England nor its maritime law gave such a cause of action. It pointed out further that the civil law was in doubt. Then, it used the words to which the petitioners mistakenly point as supporting their position. They are as follows, page 213:

> "But however this may be, we know of no country that has adopted a different rule on this subject for the sea from that which it maintains on the land, and the maritime law, as accepted and received by maritime nations generally, leaves the matter untouched. It is not mentioned in the laws of Oleron, or Wisbuy, or of the Hanse Towns, 1 Pet. Adm. Dec. Appx.; nor in the Marine Ordinance of Louis XIV, 2 Pet. Adm. Dec. Appx.; and the understanding of the leading text writers in this country has been that no such action will lie in the absence of a statute, giving a remedy at law for the wrong. Benedict Adm., 2d ed., §309; 2 Parsons' Ship. & Adm. 350; Henry, Adm. Jur. 74. The argument everywhere in support of such suits in admiralty has been, not that the maritime law, as actually administered in common law countries, is different from the common law in this particular, but that the common law is not founded on good reason, and is contrary to 'natural equity and the general principles of law.' Since, however, it is now established in the courts of the United States no action at law can be maintained for such a wrong in the absence of a statute giving the right, and it has not been shown that the maritime law, as accepted and received by maritime nations generally, has established a different rule for the government of the courts of admiralty from those which govern courts of law in matters of this kind, we are forced to the conclusion that no such action will lie in the courts of the United States under the general maritime law. The rights of persons in this particu-

> lar under the maritime law of this country are not different from those under the common law, and as it is the duty of courts to declare the law, not to make it, we cannot change this rule."

The petitioners say that this means that in the maritime law of the United States there is nothing which touches on the matter of abatement of causes of action *in personam* for personal injuries. However, what the Supreme Court meant was, obviously, that, in the so-called general and historical maritime law, the principles of which our maritime law has adopted only to the extent our courts have seen fit to do so, (*The Lottawanna,* 88 U. S. 558) there is nothing touching on a non-statutory cause of action for the death of a human being.

The Court was not, in the passage to which petitioners refer, declaring the maritime law of the United States. It was describing the content of one of the sources of the maritime law of the United States. That this is so is shown by its reference to volumes written before the United States was in existence. In so doing the court was not concerned with and did not refer to what the ancient law provided respecting abatement of causes of action for personal injury.

All of the court's remarks with respect to the ancient sources of the law were made with the purpose of throwing light on what the American maritime law was or should be with respect to the existence of a non-statutory cause of action for death. That was the subject of ultimate inquiry.

When the court finally answered the question with which it was concerned, it held merely that, since there was nothing in the ancient sources of the law which "touched upon" a cause of action for the death of a human being, there was nothing which required the court to create such a cause of

action in the maritime law and, by so doing, to produce an unseemly variance between the two legal systems.

As the court pointed out, although the jurisprudence of some countries gives a cause of action for death, no country gives one for deaths on the water and withholds it for deaths on land, or vice versa. Accordingly, it was thought that such a variance was not desirable in our laws.

This was not, as the petitioners argue, a declaration that the maritime law is under the necessity of slavishly following common law principles. It was, indeed, a declaration that the maritime law, for all its independence, and equitable notions, would not be permitted to create a variance regarding such an important matter between its provisions and the provisions of the common law.

The idea that the maritime law followed the common law was the farthest from the court's thought. What the court was concerned about was whether the maritime law would be permitted to lead the procession toward a desirable result, or must, like the common law, await legislative change.

So understood, *The Harrisburg* and other decisions cited by the petitioners have no bearing on the point decided below. Reference is made to *The Corsair,* 145 U. S, 335, *Western Fuel Company* v. *Garcia,* 257 U. S. 233. Both of these cases were cases involving causes of action for death. They were not concerned with the abatement of maritime causes of action for personal injury. Both of them recognized the holding in *The Harrisburg* to the effect that there was no maritime cause of action for the death of a human being, but neither case asserted that even that was due to the application of common law principles. The underlying thought behind both decisions was that the rule of admi-

ralty was the same as the rule of the common law, but the common law was no more applicable in the maritime system than the maritime rule was applicable in the common law system.

Indeed, it was by reason of the fact that there was nothing in the maritime law which gave a cause of action for death that the Supreme Court, in the case of *The Hamilton*, 207 U. S. 398, found it possible to permit the enforcement in admiralty of a cause of action created by a state statute. As was said in *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, at page 166:

> "In *The Hamilton*, 207 U. S. 398, an admiralty proceeding, effect was given, as against a ship registered in Delaware, to a statute of that State which permitted recovery by an ordinary action for fatal injuries, and the power of a state to *supplement* the maritime law *to that extent* was recognized." (Italics ours.)

On the other hand, in *Western Fuel Company* v. *Garcia*, 257 U. S. 233, at page 241, the Supreme Court said, with regard to its holdings in previous cases:

> "And we further held that rights and liabilities in respect of torts upon the sea ordinarily depend upon the rules accepted and applied in admiralty courts which are controlling wherever suit may be instituted."

Necessarily, the meaning of this is that the maritime law is a body of law which does not depend on the application of common law principles for its existence. On the contrary, common law courts take the maritime law from the decisions of maritime courts.

At the same time admiralty judges, in deciding on what the maritime law is, may look to the common law as well as to the civil law in order to find an appropriate maritime rule. That is what this court did in *Atlantic Transport Co.* v. *Imbrovek,* 234 U. S. 52. But there is nothing in that case to support the statement of petitioners on page 19 of their brief that "common law principles were applied." The *Imbrovek* case is a foundation stone of the doctrine that the maritime law is an independent body of law.

The controversy which raged many years ago with respect to the power of state legislatures to change the maritime law has long since been settled. While the controversy raged there were two opposed views. One took the position that the maritime law was not a *corpus juris* and, so far as concerned events happening in territorial waters, was no more than a reflection of the common law of the abutting land. The opposed position was that the maritime law was a *corpus juris,* which the Constitution required to be kept uniform, was not a mere reflection of the varying common law systems of the various states and was not subject to change by state enactment except in a special case. This court resolved the controversy by choosing the latter position.

Southern Pacific Co. v. *Jensen,* 244 U. S. 205;
Chelentis v. *Luckenbach S. S. Co.,* 247 U. S. 372;
Knickerbocker Ice Co. v. *Stewart,* 253 U. S. 149;
Western Fuel Co. v. *Garcia,* 257 U. S. 233;
Great Lakes Dredge & Dock Co. v. *Kierejewski,* 261 U. S. 479;
Robins Dry Dock v. *Dahl,* 266 U. S. 449.

It should be noted, therefore, that what the petitioners have done in order to support their claim that the maritime law is a mere reflection of the common law is to quote from those opinions which took the other side of the controversy many years ago. We refer to petitioners' quotations from Mr. Justice Holmes' remarks in *The Hamilton,* from Judge Brown's remarks in *The City of Norwalk,* 55 Fed. 98 and from the court's opinion in *Buttner* v. *Adams,* 236 Fed. 105. Petitioner's Brief, pages 17, 20, 26.

In the light of the foregoing it will be realized that the petitioners do not seek a review of a matter which was decided by a Circuit Court contrary to the decisions of this court. On the contrary, what the petitioners seek is to have this court turn back the clock, and to resurrect the bones of a dead controversy.

A word needs to be said concerning the Death on the High Seas Act of March 30, 1920, 46 U. S. C. §761-768. The petitioners, in referring to this act, say that it "does not attempt to affect State statutes either 'giving or regulating' (as by providing for survival of) actions for personal injuries resulting in death upon navigable waters within the boundaries of a State." Petitioner's Brief, page 21.

This is a crude distortion of the provisions of the Death on the High Seas Act. What that act says in Section 7 is as follows:

> "The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter."

The exception was not of actions for personal injuries resulting in death but of actions or remedies for death.

There is a vital distinction between provisions giving or regulating a cause of action or remedy for death and provisions for the survival of a cause of action for personal injuries. The effort to hide this difference by misquoting the terms of a statute is significant.

Perhaps the significance of this will be clearer when it is pointed out that other provisions of the Death on the High Seas Act lead inevitably to the conclusion that Congress has occupied the field so far as concerns the survival of actions for personal injury both on the high seas and in navigable waters within the limits of a state. This is by reason of the following:

In this statute Congress legislated not only with respect to actions for death but also with respect to actions for personal injury, and not only with respect to the high seas but also with respect to those navigable waters of the United States which are within the territorial limits of a state.

Congress first created a new cause of action for death occurring on the high seas. At the same time, it permitted the continuance of state death acts "within the territorial limits of any state." 46 U. S. C. 767.

With regard to personal injuries, Congress provided that if a person were injured by wrongful act on the high seas, and should thereafter sue in Admiralty to recover damages for the personal injuries, and should then die as a result of the injuries, the action already brought should thereafter continue in Admiralty as a suit to recover for death. 46 U. S. C. 765. The only damages recoverable were those suffered by the next of kin.

Thus, Congress had before it the matter of what should be done in case a person with a cause of action for personal injuries should die thereafter. But, it made only one change

in the law as it had been known theretofore. That change was with respect to those cases in which an action had already been begun in Admiralty to recover damages. With regard to such a case it did not provide that the cause of action for personal injuries should survive, and that the action should be revived. On the contrary, it provided that it should change into an action to recover for death. Congress did not transfer to the next of kin the damages for personal injuries to which the deceased might have been entitled. That cause of action abated. Instead, it gave the next of kin a right to recover only the damages which the next of kin themselves had suffered by reason of the death.

Congress had on option to provide that there should be, first, a survival of the cause of action for personal injuries, which would have required a revival of the action, and, second, a death action. By providing that there should be an action for death only, it showed its intent that the existing maritime law should not be disturbed. Not only those who had not begun actions for personal injury, but also those who had done so, were left in the same position as before. Henceforth, as in the past, their causes of action for personal injury should abate on their deaths.

Congress referred specifically to actions for personal injury which should occur on the high seas. With regard to those occurring within the territorial limits of a state, Congress said nothing. Indeed, the only specific action which Congress took with regard to waters within the territorial limits of a state was to preserve the state death acts.

The silence of Congress with respect to the survival statutes of the states is eloquent of Congress's intention that the maritime law with respect to the non-survival of

causes of action for personal injuries occurring on navigable waters within the limits of a state should not be affected by state legislation.

One would find it difficult to believe that Congress intentionally kept in force the Admiralty rule concerning abatement in cases where injury had occurred on the high seas but nevertheless intended that the states should be permitted to change the rule with regard to abatement when the injury should occur within the territorial waters of a state. It is more in line with common sense that Congress intended to have the same rule whether the injury should occur on the high seas or within the territorial waters of a state. Congress would be the last to intentionally produce a lack of uniformity in the maritime law, which, under the Constitution, is required to be uniform.

An analogous situation is found with respect to the Congressional statutes known as the "Employers' Liability Acts." In *St. Louis, Iron Mountain & Southern Railroad Co.* v. *Hesterly, Administrator,* 228 U. S. 702, the plaintiff sued to recover on account of the death of his intestate which had occurred in 1909. In 1908 Congress had passed the Federal Employers' Liability Act which gave a cause of action for death but which did not provide for the survival of causes of action for personal injury. A recovery of $2,000 was permitted for the death and a recovery of $5,000 was permitted for the personal injuries. The latter recovery was based on a statute of the State of Arkansas which provided for the survival of causes of action for personal injury.

The Supreme Court said that Congress's failure in the Employers' Liability Act of 1908 to provide for the survival of a cause of action for personal injuries meant that

it was Congress's intention that such causes of action should not survive and that state laws were powerless to change the situation. Furthermore, the Supreme Court was well aware that in 1910 Congress had amended the Employers' Liability Act to provide that personal injury actions should survive. It was held that the amendment did not apply to the case because the death had occurred in 1909.

Similar applications of the law are to be found in *New York Central Railroad Co.* v. *Winfield,* 244 U. S. 147, and *Lindgren, Administrator,* v. *United States, et al.,* 281 U. S. 38.

So, too, Congress, in enacting the Death on the High Seas Act, intended that the settled maritime law providing for the non-survival of causes of action for personal injury should be continued. It granted a new right of action only for death. As to local waters, it preserved only the death acts of the states. It gave general approval to the admiralty rule of non-survival of causes of action for personal injury and gave expression to that approval for causes of action arising on the high seas. Its silence concerning personal injury actions arising on territorial waters shows the same intention in the maritime field as this court said its silence showed in the field of interstate commerce.

POINT II.

A STATE LAW PROVIDING FOR THE SURVIVAL OF A CAUSE OF ACTION IN PERSONAM FOR PERSONAL INJURIES DOES NOT APPLY TO A MARITIME CAUSE OF ACTION.

The above was the holding of the Circuit Court. There were two reasons which required it. The first was that, since the cause of action was given by the Federal maritime

law, it was for Congress alone to determine when it should abate. This was a necessary result of this court's decision in *Ormsby* v. *Chase*, 290 U. S. 387.

Without question, state survival acts are inapplicable to rights granted by a Federal statute.

In *Michigan Central Railroad* v. *Vreeland*, 227 U. S. 59, it was said at page 67:

> "The statutes of many of the States expressly provide for the survival of the right of action which the injured person might have prosecuted if he had survived. But unless this Federal statute which declares the liability here asserted provides that the right of action shall survive the death of the injured employe, it does not pass to his representative, notwithstanding state legislation. The question of survival is not one of procedure, 'but one which depends on the substance of the cause of action.' *Schreiber* v. *Sharpless*, 110 U. S. 76, 80; *Martin* v. *Baltimore & Ohio R. R. Co.*, 151 U. S. 673."

We are concerned here with a right granted by the Federal maritime law, which depends on the Federal Constitution. By reason of that dependence the Federal maritime law is in the nature of a Federal statute.

As was said in *Schuede* v. *Zenith Steamship Company*, 216 Fed. 566, at 567 (affirmed 244 U. S. 646):

> "We agree with counsel for defendant that the principles of the general maritime law in force in the United States and not the subject of specific enactment by Congress are to be treated as if actually on the statute books. This must be construed to be the effect of section 2, article 3, of the Constitution, extending the power of the federal courts 'to all cases of admiralty and maritime jurisdiction,'

thus practically adopting the general law of admiralty as the law of this country, and such general law in force when the Constitution was adopted and not modified by act of Congress has the same force and is to be treated with the same consideration which must be given to statutes upon the subject. *Murray* v. *Chicago & Northwestern Railroad Co.* (C. C.), 62 Fed. 24; *The Lottawanna,* 21 Wall 558, 22 L. Ed. 654. A state may not pass any act which abridges or enlarges the responsibilities or duties of maritime law. Rights in admiralty cannot be affected by state enactment. *The Moses Taylor,* 4 Wall 411, 18 L. Ed. 337; *The Hine* v. *Trevor,* 4 Wall 555, 18 L. Ed. 451; *The Lottawanna, supra; Butler* v. *Boston Steamship Co.,* 130 U. S. 527, 9 Sup. Ct. 612, 32 L. Ed. 1017; *Workman* v. *New York,* 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314."

Again, the Supreme Court of the United States in *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149, said at page 160:

"'Since the beginning, federal courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several States—not derived from or dependent on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so administered, were distinctly pointed out long ago. * * * The field was not left unoccupied; the Constitution itself adopted the rules concerning rights and liabilities applicable therein; and certainly these are not less paramount than they would have been if enacted by Congress. Unless this be true, it is quite impossible to account for a multitude of adjudications by the admiralty courts."

Therefore, on plain jurisdictional grounds the survival of a cause of action granted by the maritime law must depend on the will of Congress alone. Congress had the subject before it when it passed the Death on the High Seas Act and deliberately refused to change the maritime law as to the survival of personal injury actions.

The second reason given by the Circuit Court for its decision was that the application of a state survival act to extend the normal life span of a maritime cause of action would be in violation of the Constitutional requirement that the maritime law be kept uniform. In other words, such an application of state law would work material prejudice to a characteristic feature of the maritime law or would interfere with its uniformity in its international or interstate relations.

The petitioners' challenge to this ruling is based entirely on the false assumption that there is not a maritime rule which provides for abatement. The petitioners say that the abatement of personal injury causes of action which has been accomplished in admiralty has depended on the application of common law principles only; and petitioners draw from the assumed applicability of common law principles in admiralty the conclusion that state statutes modifying the common law are applicable as well. Stripped of all its adornment, and reduced to its essentials, petitioners' absurd argument is constituted of two principles. The first is that there is not a Federal maritime law. The second is that, therefore, there cannot be any prejudice to its characteristic features or interference with its uniformity.

In Point I it has already been shown that the petitioners are mistaken in asserting that there is not an independent maritime law which provides for the abatement of personal

injury causes of action. It follows from that error that the argument which uses it as a premise is erroneous also.

It is because of this original error that petitioners seem not to be able to understand the difference between state statutes which give an original cause of action for death and state statutes which the petitioners seek to have applied in admiralty in such a way as to extend and modify a right already derived from the maritime law.

Petitioners say correctly that state death acts have been enforced in admiralty. They go on to say that there is no valid distinction between a state death act and a state survival statute. Petitioner's Brief, page 24. The Circuit Court disagreed because there is a vital distinction. R. 866. The distinction lies in this, that a death statute is a *new* right created by the state which admiralty will enforce, as it will enforce many other rights *created* by states, because there is nothing in the maritime law which is opposed thereto. The right given by a state death act is looked upon as supplementing the maritime law and not changing it. As this court said, in *Lindgren* v. *United States*, 281 U. S. 38, at p. 43:

> "In this situation it was held, in the absence of any legislation by Congress, that where a seaman's death resulted from a maritime tort on navigable waters within a State whose statutes gave a right of action on account of death by wrongful act, the admiralty courts could entertain a libel *in personam* for the damages sustained by those to whom such right was given. *Western Fuel Co.* v. *Garcia, supra,* 242; *Great Lakes Co.* v. *Kierejewski,* 261 U. S. 479, 480. But, as said by the Circuit Court of Appeals, such statutes 'were not a part of the general maritime law' and were recognized only because Congress had not legislated on the subject."

On the other hand, statutes which provide for the survival of causes of action for personal injury change the life span of a cause of action given by some other law. In the case at bar the cause of action was given by the maritime law. To extend the life of such a cause of action beyond the time intended by the jurisdiction which gave it is a serious and unsupportable interference.

Furthermore, when, as here, the maritime cause of action is given to residents of Missouri, is against a resident of Ohio, and arises out of a tort supposedly occurring during and as a result of the operation and navigation of a vessel in the navigable waters of the United States, there is an undoubted constitutional prohibition.

In *Robins Dry Dock Co.* v. *Dahl,* 266 U. S. 449, this court had before it the case of a ship repair man who was working on a vessel then in navigable waters at Brooklyn, N. Y. He fell into the hold and was injured. He sued his employer, a local shipyard, claiming that his injuries had been caused by negligence. The trial judge charged the jury that they might consider the provisions of the local Labor Law in deciding the question of negligence. This court held that the instruction was erroneous and said, at page 457:

> "The alleged tort was maritime, suffered by one doing repair work on board a completed vessel. The matter was not of mere local concern, as in *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U. S. 469, 476, but had direct relation to navigation and commerce, as in *Great Lakes Dredge & Dock Co.* v. *Kierejewski,* 261 U. S. 479. The rights and liabilities of the parties arose out of and depended upon the general maritime law and could not be enlarged or impaired by the state statute. *Chelentis* v. *Luckenbach S. S.*

Co., 247 U. S. 372, 382; *Union Fish Co.* v. *Erickson*, 248 U. S. 308; *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149; *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255, 259. They would not have been different if the accident had occurred at San Francisco.

The jury were distinctly told that they might consider the provisions of the local law in deciding whether or not the employer was negligent. No such instruction would have been permissible in an admiralty court, and it was no less objectionable when given by the state court. The error is manifest and material. See *Central Vermont Ry. Co.* v. *White*, 238 U. S. 507, 511; *New Orleans & N. E. R. R. Co.* v. *Harris*, 247 U. S. 367, 371; *American Railway Express Co.* v. *Levee*, 263 U. S. 19, 21."

As indicated in the above quotation, there is nothing to the petitioners' complaint which appears on page 33 of their brief that their rights have been diminished because they have been required to present their claim in a limitation of liability proceeding. As the Circuit Court pointed out, their rights would have been the same had they brought an action at common law. If they had done so, the action would have been held abated. R. 868.

Chelentis v. *Luckenbach S. S. Co.*, 247 U. S. 372, at 384;

Western Fuel Co. v. *Garcia*, 257 U. S. 233, at 241.

Indeed, the institution of the limitation proceeding has been of great service to the petitioners. Had they sued at common law they could not have enforced a cause of action *in rem* against the vessel. That cause of action can be enforced only in admiralty because it is based on a lien.

By coming into the limitation proceeding they lost nothing which they would not also have lost at common law, but they gained a chance to hold the vessel *in rem*. Such a cause of action does not abate, and the petitioners may, since they have won on the merits, have satisfaction.

However, if one assumes, as the petitioners do, that there is not an independent maritime rule of abatement of causes of action for personal injury, there is no problem, and there is, indeed, no difference between death statutes and survival statutes. If the rule applied in admiralty to abate personal causes of action is not a maritime rule but a rule of the common law, then, of course, any change in the rule is merely a change of the common law.

Perhaps there is a key which will enable us to reach the source of petitioners' error in a statement on page 24 of the petitioners' brief. There, it is said, * * *, "State statutes applying a remedy where there was none before (as in the instant case) will be recognized and enforced in admiralty."

This is an obvious confusion. An act providing for the survival of a cause of action for personal injury is not remedial. It affects the substance of a cause of action.

> *Schreiber* v. *Sharpless*, 110 U. S. 76, 80;
> *Martin* v. *Baltimore & Ohio R. R. Co.*, 151 U. S. 673.

And, when the cause of action is maritime, application of a state survival law is objectionable both on jurisdictional and constitutional grounds.

Petitioners are so concerned with glossing over the distinction between death acts and survival acts that they have gone to the length of distorting the plain meaning of words.

This appears on pages 25 and 26 of their brief, where an effort is made to draw a favorable conclusion from the opinion of the court in *Western Fuel Company* v. *Garcia;* 257 U. S. 233.

That case was concerned with an action brought to recover damages for death under a state statute, and this court held that the statute was validly applied to a death occurring on the water because the subject was local in character. The subject to which the court referred was an action for death given by state laws. However, the petitioners have seen fit to amend this court's language and thought by saying that the subject to which the court referred was "personal injuries resulting in death by wrongful act upon state waters." Having so amended the opinion of this court, they proceeded to the conclusion that personal injuries which do not result in death are also local in character.

It seems that petitioners may not realize that actions for death have nothing to do with personal injuries. They say, on page 29 of their brief:

> "* * * there could be no wrongful death without personal injury."

However, a death action is a right given to survivors and, as the Circuit Court pointed out, is in the nature of a property action. R. 866. Ordinarily, the damages depend on the financial loss suffered by the survivors. Furthermore, in point of fact death can occur without personal injury, and it was so held by this court in *The Corsair,* 145 U. S. 335, at 348.

To say, as the petitioners do, that a death act provides a remedy for a personal injury shows that the petitioners' terminology is capable of great variation in meaning. When

such a terminology is applied to the construction of one of this court's decisions the result is inevitable.

The petitioners cite on pages 29 to 32 of their brief several cases which they say support their claim that the survival acts of states have been enforced in admiralty courts. These are *In Re Long Island etc. Transportation* Co., 5 F. 599; *Steamboat Company* v. *Chase,* 83 U. S. 522; *The Corsair,* 145 U. S. 335; *The Albert Dumois,* 177 U. S. 240; *Quinette* v. *Bisso, et al.,* 136 Fed. 825.

All of these cases were cited in the Circuit Court. In not a single one of them was a state survival act enforced in admiralty. In each of them the action was to recover for death. In some of them the statutes involved did not even provide for survival.

In *In Re Long Island, etc. Transportation Co.,* 5 F. 599, the particular death statute (New York) is not set forth in the opinion, but the opinion says that the claimants were seeking damages for death. 5 F. 599, at 607. The claimants could not have been seeking damages for personal injury, for, under New York law, an action for personal injuries did not survive in 1881.

In *Steamboat Company* v. *Chase* the particular death statute (Rhode Island) is set forth at 83 U. S., 522. It does not provide for the survival of a cause of action for personal injuries. It does provide a cause of action for damages caused to next of kin by reason of another's death.

In *The Corsair,* 145 U. S. 335, the action was brought to recover solely for death, and was dismissed because the action had been brought *in rem,* the statute not giving a lien. Although the Louisiana Death Act provided both for a cause of action for death and for the survival of actions for personal injuries, the latter was not involved in the

case. Indeed, had the claim been for personal injuries the action would not have been dismissed because under the maritime law a cause of action for personal injuries survives in *rem*. This is because the lien attaches during the lifetime of the injured person.

In *The Albert Dumois*, 177 U. S. 240, the claim was brought to recover damages for death under the Louisiana statute. This appears on page 257 of the opinion. The survival of a cause of action for personal injuries was not involved.

Furthermore, the Massachusetts survival statute, which the petitioners say was involved in this case, was not even mentioned. Indeed, its utter irrelevance is to be assumed in view of the fact that the case involved a death as a result of a collision between two vessels in the Mississippi River below New Orleans.

Quinette v. *Bisso*, 136 F. 825, was a case in which there was a claim for damages under that portion of the Louisiana statute which provided for a cause of action for death. That part of the statute which deals with the survival of a personal injury action was not involved. Indeed, the death in that case was by drowning and because of that there could not have been a cause of action for personal injuries.

The Corsair, 145 U. S. 335, at 348.

There is not one decided case which holds that a state survival statute may be applied to extend a maritime cause of action. On the other hand, the case of *Crapo* v. *Allen*, Fed. Cas. No. 3360, holds that it cannot. Furthermore, the

case of *The Lafayette,* 269 F. 917 decided in the Second Circuit, is persuasive authority to the same effect. There, the action was in admiralty, but in *rem.* The claimants died after suit had been begun. A New York statute provided that actions for personal injury should abate on the death of the *tort feasor,* and it was argued that the New York statute was controlling. In other words, it was maintained that, even though the action was founded on a lien, it was still an action to recover for personal injuries, and that, accordingly, the death of the *tort feasor* produced an abatement by reason of the local law. But the Circuit Court held that it did not, and said at p. 927:

> "Our attention has been called to a number of New York decisions that a claim for personal injuries does not survive the death of the injured party; and we are also informed that in pursuance of the New York statutes causes of action for personal injuries abate upon the death of the parties. *But what has been already said must have made it clear that these actions, arising out of a maritime tort and giving rise to a maritime lien, are not subject to the rules of the common law courts or to the statutes of the state of New York. We are dealing with a maritime tort, and the rights of the parties are to be determined upon the principles of the maritime law. The lien which is claimed is not one created by any state. The damages which are sought are not damages for causing death."* (Italics ours.)

The petitioners do not mention this case.

The decision of the court below was correct. It was not only in accord with previous decisions of courts of equiva-

lent jurisdiction, but it was required by principles derived from decisions of this court as well. The petitioners have brought forward nothing which merits review, and their petition should be denied.

Respectfully submitted,

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